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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN ERIC MORRIS,) CASE NO. C06-1621-MJP-MAT
Petitioner,)
v.) ORDER DENYING PETITIONER'S
BELINDA STEWART,) HABEAS PETITION WITH
Respondent.) PREJUDICE

This matter comes before the Court on Petitioner's 28 U.S.C. § 2254 habeas action (Dkt. Nos. 1 & 16.) Having reviewed the petition for writ of habeas corpus, the Report and Recommendation of Judge Mary Alice Theiler, United States Magistrate Judge and Petitioner's



06-CV-01621-ORD

01 objections¹ thereto, the Court DISMISSES the action with prejudice.

02 In his habeas petition, Mr. Morris argues three grounds for relief. Mr. Morris failed to
 03 exhaust his state remedies on the first two grounds and is now procedurally barred from bringing
 04 those claims under RCW 10.73.090. Third, Mr. Morris argues that community confinement
 05 constitutes imprisonment and thus his sentence of a 130 month term of confinement and a 24 to
 06 28 month term of community custody exceeded the maximum sentence range. In his objections,
 07 Mr. Morris asserts that this Court should hold his habeas action in abeyance until the Washington
 08 Supreme Court decides this issue in its review of State v. Tarabochia, 3411-5-II (Wash. App.
 09 Div.2, 4/17/2007)².

10 Mr. Morris previously brought this issue before the Snohomish County Superior Court
 11 and it was later dismissed by the Washington Court of Appeals. (Dkt. No. 21, Ex. 15; Dkt. No.
 12 17.) Mr. Morris then filed a motion for discretionary review in the Washington Supreme Court.
 13 The Commissioner denied review, first finding that the petition was barred by the expiration of

14
 15 ¹ The Court construes Petitioner's "Motion for Abeyance" (Dkt. No. 25) as an objection to the
 Report and Recommendations.

16 ²
 17 Mr. Morris' reliance on Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) and Neuschafer v.
 18 Whitley, 860 F.2d 1470 (9th Cir. 1988) is in error. In Fetterly, the petitioner discovered new
 19 constitutional issues while his habeas petition was pending. 997 F.2d at 1299. The Ninth Circuit
 20 held that the trial court erred when it refused to grant the petitioner a stay; the court found that the
 21 petitioner should have been allowed to exhaust the newly identified constitutional issues in state
 22 court before the federal court reviewed his habeas petition. Id. at 1300. In Neuschafer, the Ninth
 Circuit found that petitioner did not abuse the writ of habeas corpus when he deliberately withheld
 certain unexhausted claims from his first petition and that the district court erred in dismissing
 petitioner's second habeas petition, brought after those claims had been exhausted. Mr. Morris
 has neither discovered new constitutional issues in his case nor is his petition being denied for
 abuse of the writ of habeas corpus. Further, Mr. Morris' unexhausted claims are now
 procedurally barred under RCW 10.73.090.

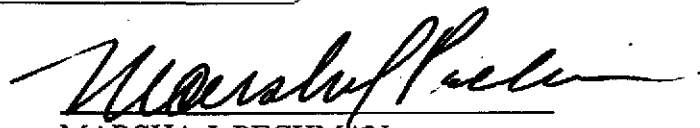
01 the one-year statute of limitations under RCW 10.73.090(1), and, in addressing the merits of the
02 state law claim, found that Mr. Morris had received a lawful sentence that was valid on its face.
03 (Dkt. No. 21, Ex. 19 at 1-2.)

04 Because the Commissioner of the Supreme Court found that Mr. Morris' third ground for
05 relief was procedurally barred, Mr. Morris cannot pursue the claim in federal court without
06 demonstrating a fundamental miscarriage of justice, or cause and prejudice. See Coleman v.
07 Thompson, 501 U.S. 722, 735 n.1, 749-50 (1991); Harris v. Reed, 489 U.S. 255, 263 (1989). Mr.
08 Morris' assertion that the Washington Supreme Court will be hearing the case of State v.
09 Tarabochia is not sufficient to overcome the procedural bar.

10 The Court adopts the Report and Recommendations. Petitioner's federal habeas petition
11 (Dkts. No. 1 & 16) is DENIED and this action is DISMISSED with prejudice.

12
13 The Clerk is directed to send copies of this Order to petitioner, to counsel for
14 respondent, and to Judge Theiler.

15 DATED this 30 day of Oct., 2007.

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17 MARSHA J. PECHMAN
18 United States District Judge
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